Supreme Court, U.S.
FILED

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No.

In the

# Supreme Court of the United States

GARY RAVET and PROMARK INC.,

*Petitioners,*

v.

ENTERTAINMENT PUBLICATIONS, INC.,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## SUPPLEMENTAL APPENDIX

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16 pp

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OP CALIFORNIA

CASE NO: 98-CV-2306 TW (RBB)

ENTERTAINMENT PUBLICATIONS, INC.,
a Michigan Corporation
Plaintiff,

vs.

GARY RAVET, an individual, PROMARK, INC.,
a California Corporation
Defendants.

Filed October 26, 1999

ORDER GRANTING PLAINTIFF'S MOTION TO CONFIRM ARBITRATION AWARDS; DENYING MOTION FOR SANCTIONS; DENYING APPLICATIONFOR TEMPORARY RESTRAINING ORDER; TERMINATING CASE

Plaintiff Entertainment Publications, Inc. ("EPI") moves for an order confirming sever al arbitration awards issued by the Honorable Layn R. Phillips, U.S. District Court Judge (retired). Defendants Gary Ravet and Promark, Inc. oppose. All parties are represented by counsel. For the reasons expressed below, the court GRANTS EPI's motion.

## I. BACKGROUND

The following facts are largely taken from *the* court's order dated July 6, 1999. On June 11, 1998 EPI and Promark executed an *asset* purchase agreement in which EPI acquired substantially all the assets of Promark, Inc. ("Promark"),

including its trade name and an employment agreement with Promark's owner. Gary Ravet ("Ravet"). Within a few months, the employment relationship between EPI and Ravet deteriorated, leading to the termination of Ravet's employment.

On December 22, 1998 EPI filed *this* action against Ravet and Promark alleging claims sounding in breach of contract and trademark infringement. On February *2,* 1999 the parties stipulated to a voluntary mediation in San Diego, California, to take place on February *9* and 10, 1999 before the Honorable Layn Phillips, a retired United States *District* Judge. At the February 9, 1999 mediation, the parties agreed to a settlement that included the mutual release of liability and dismissal with prejudice of all pending litigation between the parties. The settlement also included a provision requiring disputes arising out of the settlement agreement to be resolved by Judge Phillips in binding, non-appealable arbitration.

Subsequent disagreements arose between the parties such that the February 1999 settlement agreement was never executed. Both EPI and Ravet contend that they made efforts to abide by the agreement but such efforts were thwarted by renegotiation and delay on both tides.

On May 21,1999 defendants filed a 46-page complaint in San Diego Superior Court asserting claims for-fraud, misrepresentation, breach of contract, and economic interference. The allegations in the complaint arise from EPI's conduct occurring during and prior to the February 1999 settlement negotiations. Specifically, Ravet and Promark's injuries stem from EPI's alleged misconduct in connection with various agreements between the parties, including (1) an asset purchase agreement, (2) an employment agreement, (3) a license agreement, and *(4)* a bonus agreement. Additionally, Ravet and Promark claimed various other injuries arising out of the February 1999

settlement agreement. *On* May 25, 1999 EPI removed defendants newest action to this court *the* basis of diversity of citizenship. Promark, Inc. v. Entertainment Publications Inc, No. 99-CV-1081 TW (RBB) ("Promark").

Shortly thereafter EPI moved to compel arbitration in both this action, and in the more recently filed Promark matter. On July 6, 1999 the court issued separate orders granting EPI's motions to compel arbitration. Pursuant to those orders, the parties scheduled another arbitration for August 9, 1999. On July 21, 1999 the arbitrator's office confirmed the parties' arrangements in writing and set a briefing schedule. Both sides submitted arbitration briefs in support of their respective positions. In addition, the Arbitrator scheduled a conference call for Friday, August 6, 1999 in order establish the protocol for the following Monday's hearing.

Both parties attended the August 6, 1999 conference call and neither side expressed an intention of not attending the August 9, 1999 arbitration. Later that same day, Promark and Rivet filed an emergency ex parte application seeking an order removing Judge Phillips *as* the parties arbitrator. By order dated August 13, 1999 the court wholly denied defendants' ex parte application finding their "last minute attempt to circumvent a court ordered arbitration that all parties have known about since at least July 6, 1999 had failed in all respects? (Aug. 13, 1999 Order Denying Plaintiffs' Ex Parte Application at 5).[1]

On the morning of Monday, August 9, 1999 EPI attended the arbitration before Judge Phillips. Notably absent from the arbitration was any representative appearing on behalf of Promark or Ravet. The primary reason offered by Promark and Ravet for not attending the arbitration was that they had purportedly elected, just minutes before the arbitration was set to begin, to accept EPI's May 13, 1999 proposal regarding the February 9-10, 1999 settlement.

According to Ravet, "acceptance" of EPI's May13 proposal rendered the arbitration proceedings moot and resolved all differences between the parties.

Notwithstanding defendants' election to *not* participate in *the* arbitration, Judge Phillips issued a Confidential Arbitration Order later that same *day* establishing what EPI contends are the settlement terms between the parties. (Deroche Decl. Ex. I). The August 9, 1999 Arbitration Order also held:

> The action entitled Inc. v. Entertainment Publications Inc., USDC Southern District Case No. 99-CV-1O8 11W (RBB) is barred in its entirety by the release contained in the settlement agreement the concessions made by Ravet in his sub missions to the Arbitrator, the prior rulings of *this* Arbitrator including its May 10, 1999 Order, the transcript of August 9,1999 and this Order.

(Deroche Decl. Ex. I. at 2)

Shortly after the August 9, 1999 arbitration, Ravet informed EPI in writing that be had no intention of complying with Judge Phillips' Arbitration Orders. (Deroche Decl. Ex K). On August 16, 1999 EPI requested that Promark and Ravet stipulate to the confirmation of the arbitration awards. Promark and Ravet refused. (Deroche Decl. Ex. L). EPI now moves to confirm all prior arbitration awards between the *par* seeking a court order directing the parties to abide by the terms of Judge Phillips' prior rulings.

## II. LEGAL STANDARD

In the Ninth Circuit, judicial review of an arbitration award is limited and highly deferential" Sheet Metal Workers' Int'l Sass's v. Madison Indus., Inc., 84F.3d 1186, 1190 (9th Cir. 1996) ("Sheet Metal"). A district court must uphold the findings of the arbitrator so long as *they* are plausible. Tri-Star Pictures, Inc. v. Director's Guild of Am. Inc., 160 F.3d 537, 540 (9thCir. 1998). An arbitration award will not be set aside unless it manifests a complete disregard for the law Sheet Metal, 84F.3d at 1190. The award must be confirmed if the arbitrator even arguably construed or applied the contract and acted within his scope of authority. United Food & Int'l Union v. Foster Poultry Farms, 74 F.3d 169,173(9th Cir. 1995); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 P.2d 1056, 1060 (9th Cir. 1991) (same); *A.G.* Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 *(9th* Cir. 1992) ("The courts should not reverse [an arbitration award} even in the face of erroneous interpretations of *the* law.").

## III. DISCUSSION

Relying on the Federal Arbitration Act *9* U.S.C. S 9, EPI applies for an order confirming several arbitration awards issued by Judge Phillips. *The* specific awards for which EPI seeks confirmation are: (l)the awards entered on the record during an April 1, 1999 arbitration; (2) a May 10, 1999 written award; (3) an August 9, 1999 written award; and (4) an August 15, 1999 award. Promark and Rivet oppose on the ground that the arbitration awards have been rendered moot and unenforceable ba5ed on their purported acceptance of EPI's May 13, 1999 proposal regarding the February 9-10, 1999 settlement just minutes before commencement of the August 9, 1999 arbitration hearing.

## A. CONFIRMATION OF ARBITRATION AWARDS

"It is generally held that an arbitration award will not be set aside unless it evidences a manifest disregard for law. Todd Shipyards, 943 F.2d at 1060; First. Options of Chicago, Inc. v. Kaplan 514 TJ.S. 938, 942, 115 S. Ct. 1920, 1923 (1995). Indeed "arbitrators are not required to state the reasons for their decisions.' United Steelworkers of America v. Enterprise Wheel & Car Carp, 363 U.S. *593,* 598, 80 S. Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960); Kaiser *Cement* Corp. v. Fischbach and Moore, Inc., 793 F.2d 1100, 1102 n.6 (9th Cir. 1986). The rule that arbitrators need riot state their reasons presumes the arbitrators took a permissible route to the award where one exists. Sargent v. Paine Webb Jackson & Curtis Inc., 882 F.2d 529, 532 (D.C. Cit. 1989). As stared by the Ninth Circuit:

> (A]n award such as this, which is one within the terms of the submission, will not be set aside by a court for error in law or fact.. Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts ... If the award is within the submission, contains the honest decision of the arbitrator, after a full and fair hearing of *the* parties, a court.. . will not set it *aside* for error, either in law or fact.

San Martine Compania DeNavegacion v Saguenay Terminals Ltd., 293 Fid 796, 800 (9th Cit. 1961) (quotations omitted). Accordingly, under the Federal Arbitration Act ("FAA"), an arbitration award is rarely overturned. Sheet Metal, 84 F.3d at

1190. Unless the party resisting confirmation can show that *the* awards violate the FAA or constitute a manifest disregard of the law, the court must confirm the awards. Id.

As previously held in the court's July 6,1999 orders, the parties expressly agreed to arbitrate any and all disputes arising from their February 1999 settlement Since then, two separate arbitrations have been held and multiple orders have been issued by Judge Phillips. "The first arbitration, a five hour session held on April 1, 1999, resulted in oral rulings on certain issues and request for further briefing as to others. (See Deroche Decl. EL A Transcript April 1, 1999 Proceedings)). On May 10, 1999 Judge *Phillips* issued a written "Confidential Arbitration Order Resolving Disputes Arising Out of Settlement." (Deroche Decl. Ex. B.) EL B) Among other things, Judge Phillps' order noted:

> Civil cases don't come nastier than this one While the lawyers in this case demonstrated excellent advocacy skills at every phase of the proceedings, the parties in this case, former business allies who now find themselves as courtroom adversaries, clearly hate each other, professional civility is on the decline, and the atmosphere at every hearing is dripping with personal *animosity.* With all of this background, *it* is amazing that, for one brief moment in February 1999, the parties were able to lay down their swords, set aside their differences and find common pound in the form of a mediated settlement... As part of the settlement, the parties agreed that, should any disputes arise out of either the finalization of the settlement documentation . . . those disputes, rather than going back to court, will be resolved before Judge Phillips] in final,

binding non-appealable arbitration."

(Deroche Decl. Ex. B at 1). By consenting to arbitration and absent a manifest disregard for the *law*, Promark and Ravet expressly surrendered any right they might otherwise have had to challenge the finality of the arbitration awards. Todd Shipyards, 943 F.2d at 1063-64; see also Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (due regard must be given to federal policy *favoring* arbitration). Indeed, on *July* 6, 1999 this court ordered the parties to attend a subsequent arbitration before judge Phillips that was ultimately scheduled for and held on August 9, 1999.

B. DEFENDANT'S ELECTION TO NOT ATTEND THE AUGUST 9, 1999 ARBITRATION DID NOT ALTER THE VALIDITY OF JUDGE PHILLIPS' ORDERS

Ravet and Promark also suggest that their absence from the August 9, 1999 arbitration invalidates it result. The court disagrees. Unless otherwise agreed to, "procedural matters become part of the bundle of issues committed to decisions by the arbitrator," and an award should not be vacated on procedural grounds unless the procedure employed was a sham, substantially inadequate or substantially unavailable." Federal Deposit Ins. Corp. v. Air Florida Systems, Inc., 822 F.2d 833, 142 (9th Cir. 1987).

Defendants' last-minute refusal to participate in the court ordered arbitration that had been scheduled weeks in advance does nothing to alter the enforceability of Judge Phillips' ruling. The arbitration agreement itself was self-executing and did not vest Ravet or Promark with the authority to unilaterally withdraw from noticed arbitration

proceedings. The parties' agreement expressly required that "those disputes, rather than going back to court, will be resolved before Judge Phillips] in final, binding non-appealable arbitration." *(July* 6, 1999 Order at 6-7). Moreover, the time of their attempted withdrawal, Promark and Ravet were already subject to a direct order issued by this court which compelled attendance at the arbitration. Despite knowledge of the court's express mandate, Promark and Ravet disregarded the court's order by refusing to attend the August 9, 1999 arbitration. Promark and Ravet have not alleged or *even* suggested that they lacked proper notice or that the procedures adopted by Judge Phillips were a sham. The court therefore holds that Promark and Ravet's failure to appear at the August 9, 1999 arbitration does not in any way affect the validity of Judge Phillip's arbitration orders.

C. DEFENDANTS COULD NOT HAVE ACCEPTED EPI'S MAY 13, 1999SETTLEMENT PROPOSAL BECAUSE IT HAD ALREADY BEEN REJECTED, OR HAD EXPIRED BY ITS OWN TERMS

Promark and Ravet also argue that the arbitration was rendered moor by the purported acceptance of a settlement proposal originally offered by EPI on May 13, 1999. Specifically, Promark and Ravet contend that on the morning of August 9, 1999-just minutes before the arbitration to begin-they decided to "accept" EPI's May 13, 1999 proposal regarding the parties' February 9-10, 1999 settlement. Promark and Ravet contend that their acceptance of the May 13, 1999 proposal rendered any further arbitration between the parties moot and officially resolved any and all disputes between the parties.

Defendants' purported acceptance of EPI's May 13, 1999 proposal fails to abrogate the validity of Judge Phillips'

arbitration orders for at least four reasons. First, Promark and Ravet rejected the May 13, 1999 proposal only days later—and three months before their purported acceptance on August 9, 1999. In a letter dated May 17, 1999, Ravet wrote to EPI, "Congratulations! You and your clients have now successfully killed the proposed settlement of disputes. . . The parties are now back into litigation, with even more issues and causes of action than before?" (Kennedy Decl. ¶ 4, Ex. A). Although Ravet contends that he had not received the settlement papers at the time he wrote the letter, the letter clearly evinced that Ravet had no intention to accept any EPI settlement proposal *as* of May 17, 1999.

The next day, Ravet wrote a second letter to EPI, confirming that be considered EPI's terms "unacceptable." (Kennedy Decl. ¶5, Ex. B). Ravet stated that *his* prior version of the settlement agreement "set forth the exact terms and conditions . agreed upon by the parties on February 10, 1999" and that EPI had wrongfully "insisted on at least the following changes to the settlement agreement each of which is *unacceptable* to me." Id. (emphasis supplied). In three paragraphs of his letter, Ravet described various aspects of EPI's settlement proposal that he found unacceptable, including (1) the defective date of the agreement, (2) the identity of the payees on the settlement checks, and (3) the incorporation of judge Phillips' prior rulings. a Ravet's letter further insisted that "no agreement existed as of February 10, 1999" - a position completely inconsistent *with the May* 13 proposal which expressly incorporated the February 10, 1999 settlement. Ravet concluded his letter by stating *"I* would think that you and your client would have learned by now not to threaten or try to bully me. Doing so only serves to strengthen my resolve and fuel my determination." *Id.* Ravet's letter dearly communicated his intention to reject any and all settlement proposals offered by EPI. The court therefore finds the May *18,* 1999 letter expressly rejected EPI's *May* 13, 1999 settlement proposal.

Second, to punctuate the rejection of EPI's May 13, 1999 settlement proposal, Ravet, acting as his own attorney, made good on his threat and on May 21, 1999 filed a new action in San Diego-Superior Court entitled Promark, Inc. v. Entertainment Publications, Inc., Case No. 730997. (Def's Req. Jud. Notice, *Ex.* C). The new *action* contained no less than seventeen causes of action, including allegations of breach of the original employment and *asset* purchase agreements between the parties and the fraud in the inducement claim he had raised before, which had been previously rejected by Judge Phillips. Id. at 25:21 - 28:22; see also July 6, 1999 Order at 8-10). The *new lawsuit,* like *Ravet's May* 17 and May 18 letters, claimed that EPI had never intended to resolve the parties' differences - and represented yet another manifestation that Ravet had not accepted *any* previous settlement proposals. (Def's Req. Jud. Notice, Ex. C, at 24:5-8).

Third, on May 25, 1999 Rivet wrote another letter to EPI offering new settlement terms. (Kennedy Decl. ¶ 6, Ex. C). Specifically, Rivet sought more money and stated: "As you will recall, at the mediation between the parties that took place in February 1999,t was prepared to settle all disputes for $650,000. I am prepared to accept that *amount* now." *id.* However, Rivet's newest offer to settle was more than doable the $285,000 amount allegedly agreed upon by the parties in February 1999. It is well-settled that "[a] qualified acceptance or counteroffer constitutes a rejection of the original offer, and the original offer cannot thereafter be accepted by the offeree." 1 Witkin *Summary of* California Law, Contracts 190, at 201 (9th ed. 1987); Cal. Civil Code 1985 ("A qualified acceptance is a new proposal."); Panangotacos v. Bank of America, 60 Cal. App. 4th 861 (1998) (finding that offeree's inclusion -of additional: payment terms transformed purported acceptance into counteroffer) At minimum, Rivet's attempt to raise the ante in the parties' settlement negotiations was clearly a rejection and/or counter-offer to

EPI's original May 13, 1999 settlement proposal.

Finally, even assuming Promark and Ravet had not rejected the May 13, 1999 proposal, the proposal had expired long before. By its own terms, the May 13, 1999 settlement proposal called for a Closing Date" no later than May 17, 1999. As previously noted, Ravet's letters dated May 17, 18, and 25 clearly rejected or attempted to modify the express terms of EPI's settlement proposals. Moreover, the passage of time, as here, can result in the lapse of an offer. Cal. Civ. Code S 1587. Specifically, an offer is deemed revoked "by the lapse of a reasonable rime without communication of acceptance." Cal. Civ. Code § 1587(2). What constitutes a reasonable period of time is a question of fact, dependent on the circumstances *existing* when the offer and attempted acceptance are made. 1 Witkin Summary of California Law, Contracts §164, at 184(9th ed. 1987).

Here, the most compelling that the May 13 settlement proposal bad expired is the proposal's express requirement that the "Closing Date" be no later than May 17, 1999. (See Webb Decl., Ex. A. at ¶A.2). That paragraph expressly stated, "[t]he transaction contemplated by this agreement will close on May 17, 1999 (the 'Closing Date')." (Id.). Defendants' admitted failure to "accept" the *May* 13, 1999 proposal until August 9, 1999 -84 days after the day contemplated for performance – clearly exceeds any definition of a reasonable time to accept given that performance was originally called for by May 17, 1999.

In sum, the court finds that defendants' purported acceptance of EPI's May13 proposal on the morning of August 9, 1999 *was* invalid because the May 13 settlement proposal had expired or had been previously rejected, modified, or countered by Promark and Ravet. As such, Promark and Ravet's absence from the arbitration was unwarranted and without justification, and their purported acceptance did not render moor the August 9, 1999

arbitration.

D. CONFIRMATION IS WARRANTED

The Federal Arbitration Act specifically authorizes district courts to confirm arbitration awards where, as here, the parties' agreement establishes that the arbitrator's rulings are to be binding. *9* U.S.C. S 9; S Milwaukee Typographical Union N& 23 v. Newspapers, Inc., 639 F.2d 386, 389-90 (7th Cir. 1981) (contract providing that decision of the arbitrator shall be final and binding upon both parties held sufficient to imply consent to entry of judgment). in this case, the parties expressly agreed that all disputes would be resolved through "final, binding, non. appealable arbitration. . ." (July 6, 1999 Order at 7:8-12 (quoting Deroche Decl. Ex. A, at 13)).

A district court *must* uphold *the* findings *of* the arbitrator so long *as they are* plausible. Tristar Pictures, Inc. v. Director's Guild of Am. Inc., 160 F.3d *537,* 540 (9th Cir. 1998). An arbitration award will not be *set* aside unless it manifests a complete disregard for the law. Sheet Metal, *$4* F.3d at 1190. The grounds for overturning an arbitration award are narrow and the court finds that none arc present in this case. "If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced." Sheet Metal Workers 863 F.2d at 653.

Here, the first set of orders appears in the transcript of the April 1, 1999 hearing (Ex. A to Deroche Decl., various rulings by Judge Phillips during oral argument) *and* the May 10, 1999 written order. (See Deroche Decl., Ex. B (addressing the fraud and expense issue)). The second set of arbitration orders appears in the August 9, 1999 written *order* and the August 15, 1999 written order (Deroche Decl. Exs. H, I). These orders were all issued pursuant to the parties' agreement to arbitrate The court has reviewed each order and

finds them well-reasoned, properly founded on the facts of this case, and without manifest disregard for the law.[2]

## IV. CONCLUSION AND ORDER

Judge Phillips stated ft best in his *May* 10, 1999 order when he wrote, "This litigation must END." EPI is entitled to the benefits of the settlement it bargained for over six months ago. For the reasons stated above, the court GRANTS EPI's motion to confirm the arbitration awards. The arbitration awards issued by Judge Phillips on (a) April 1, 1999, (b) May 10, 1999, (c) August 9, 1999 and (d) August 15, 1999 arc hereby CONFIRMED in their entirety, and incorporated by reference herein. The court hereby enters FINAL JUDGMENT in favor of EPI and against Gary Ravet and Promark Inc. EPI's motion for a temporary restraining order is DENIED as moot.[3] Finally, EPI's motion for sanctions is DENIED.[4] The Clerk of Court shall close the district court case file.

IT IS SO ORDERED.

DATE:October 26, 1999
Judge THOMAS J. WHELAN
United States District Court
Southern District of California

Footnotes

[1] The *ex* parte application and the court's order denying it are entered in the record of the Promark case.

[2] Promark and Ravet contend that Judge Phillips exceeded his authority and violated the constitution by

finding their conduct "vexatious" and by requiring approval from Judge Phillips before commencing litigation relating to the settlement agreement. Promark and Ravet have not, however, identified any legal ground that would justify invalidating this provision. The pre-filing requirement does not amount to a judicial declaration that Promark and Ravet are "vexatious litigants" within the meaning of the California Civil Code, and the provision has no affect outside the scope of this litigation. The court also finds the pre-filing requirement narrowly tailored to achieve the object of the settlement-the termination of this litigation.

[3] EPI's application for a temporary restraining order sought to secure interim relief pending this court's determination on EPI's motion to confirm Judge Phillips' arbitration awards. Because *the* motion has been granted, the court finds the restraining order application moot. To the extent the application is not moot, court denies it on its merits.

[4] The court finds sanctions inappropriate in *this* case for two reasons. First, Judge Phillips expressly declined to award sanctions or attorney's fees to EPI. Second, the court is confident that provisions in Judge Phillips' arbitration *awards,* including restrictions on filing subsequent actions relating to the February 1999 settlement agreement, completely address EPI's concerns of Ravet's alleged misconduct. The court is also confident that Raves, a licensed California: attorney, fully appreciates the risks and consequences associated with violating Judge Phillips' arbitration orders, which are now the order of this court by of their confirmation.